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United States Senate
Washington DC 20510

Dear Senator:

Subject: NextWave spectrum reallocation and wireless competition

We understand that an amendment may be presented during the defense appropriations bill to end the five-year dispute over NextWave's acquisition of wireless spectrum and subsequent bankruptcy. Accounts indicate that this legislation may be necessary to facilitate the transfer of NextWave's wireless licenses to other wireless carriers who successfully bid for these licenses.

The proposed legislation is a raw deal for American taxpayers. The amendment would make taxpayers bear the financial risk of the Federal Communications Commission's (FCC) bungling of the license process. The FCC should never have handed over these licenses free and clear before they received payment for them.

Under this deal taxpayers would have to pay Nextwave \$9 billion. Nextwave would then pay its tax bill of \$3 billion, leaving the company with \$6 billion. Subsequently, the companies that bid \$15.7 billion for this spectrum last January will reimburse the treasury for these payments, covering taxpayers' expenditures. If everything goes as planned, taxpayers will be covered. However, as this deal should have taught Congress, things do not always go as planned. Rather than giving Nextwave a huge windfall, Congress should focus on insulating taxpayers from financial risk and making sure that we serve consumers' need for more competition between wireless and wireline companies.

It is important to remember that Nextwave would have originally paid more than \$4.7 billion for this slice of spectrum, but never had to bid against the large incumbent providers under the "designated entity" rules set up to increase competition by favoring entrepreneurs that would be new market entrants. Now, five years later—having defaulted on their payments and having served no customers—the FCC is in effect allowing Nextwave to turn around and sell their licenses to Verizon and other large incumbents for a \$9 billion profit (\$6 billion after taxes). The public loses twice. First, spectrum it sold on a discounted basis to add competition to the market—but that "competition" comes primarily from the nation's largest cell phone company. Second, a company that manipulated the auction process and defaulted on its responsibilities is being paid \$9 billion in ransom, revenue coming straight out of taxpayers' pockets.

Instead of handing approximately \$6 billion to a company that never signed up a single customer, Congress should be concerned about making sure independent wireless companies survive. It is the competition from a diversity of wireless business models that drove wireless prices down and ratcheted up quality of service over the last decade. As the FCC just eliminated the primary mechanism for ensuring that competitive diversity—the 45 MHz wireless spectrum cap—it is up to Congress to repair the crumbling competitive foundation that has given consumers affordable rates, increased choice and better service.

The FCC claims there is no better alternative to this deal; that at least the public will receive a portion of the auction revenue (\$6 billion instead of the \$15.7 bid last January) as well as better cell phone service as incumbents put the spectrum to use. But in fact, the public would be no worse off—and probably far

better off—if this settlement is rejected and the FCC proceeds with its appeal to the U.S. Supreme Court. If the FCC wins before the Supreme Court, the public would receive the entire \$15.7 billion and the confusion over interpretation of bankruptcy law would be resolved in favor of the government. If the FCC loses in court, then Nextwave will have to pay the government what it owes from the original auction. If this turns out to be grossly inadequate, the FCC can re-auction the spectrum after 2006 when the license expires and more than make up for any losses. Even a loss before the Supreme Court would clarify the disputed interpretation of the status of FCC licenses in bankruptcy law – and allow Congress to fix that law if it chooses.

Most importantly, Congress should ensure that the FCC uses the license allocation process to create wireless alternatives to local wireline monopolies, rather than handing over more spectrum to local monopolies when they have no incentive to compete against their core businesses. If the FCC continues to foster nothing but consolidation in the wireless industry, consumers will see the vibrantly competitive marketplace for wireless services evaporate into an extension of the local phone monopoly. Competition, not the beneficence of incumbent monopolies, is what makes markets work.

If Congress is going to smooth the way for wireless companies to expand their service areas or obtain wireless licenses, we believe Congress should both ensure that taxpayers do not bear additional financial risks, and also make sure that the FCC does nothing that diminishes the number of wireless suppliers unaffiliated with wireline local telephone companies.

Sincerely,

A handwritten signature in black ink, appearing to read "Chris Murray".

Chris Murray
Telecom and Internet Counsel
Consumers Union

A handwritten signature in black ink, appearing to read "Gene Kimmelman".

Gene Kimmelman
Co-Director, Washington Office
Consumers Union